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# The Administrative Civil Penalty Process



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# Purposes of this Presentation:

- Familiarize new Board members with the Administrative Civil Penalty (ACP) process
- Explain the process
- Explain the respective roles of the Board, the Department, and Office of Administrative Hearings (OAH)



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# Background: Enforcement Options

CAL FIRE has many enforcement options:

- Notice of Violation (Warning)
- Criminal Prosecution (PRC §4601)
- Stop Work Order (PRC §4602.5)
- Attorney General (AG) (on own motion or at Board's Request) (PRC §4603)
- Injunctive Relief (PRC §4606)
- Notice of Corrective Action (PRC §4608)



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# Background: Enforcement Options

CAL FIRE also has licensing options:

- RPF license complaint to PFEC
- LTO license denial/revocation (PRC §§4573, 4574, 4576)
  - Person whose LTO license has been denied/revoked may not be involved in future timber operations (PRC §4576.1)
  - A blunt instrument for only the worst cases



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# Background: Enforcement Options

CAL FIRE also has civil penalty options:

- Civil penalty action in civil court (PRC §4601.1)
- Administrative Civil Penalty action (PRC §§4601.1 and 4601.2)
- Max. penalties and factors the same
- Practical distinctions are who carries case forward (Dept. personnel or AG) and who decides case (Board or Court)



# Background: Leg. History

- Prior to 1999, all enforcement options available except civil penalties
- SB 621 (Sher) (Stats. 1999, Ch. 582) added civil penalties
- Act & Rules recognized as only environmental regulatory scheme without civil penalties
- “According to the author's office, existing misdemeanor criminal penalties of \$1,000 are inadequate, and often represent little more than the cost of doing business.” (Senate Report)



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# Regulatory Basis

ACP process based on Forest Practice Act:

- §4601.1 gives authority
- §4601.2 fleshes out authority
- §4601.3 provides judicial review

ACP process further explained in Rules:

- Subchapter 7, Art. 3.2 (§§1057-1059)

Also subject to Administrative Procedure Act:

- Gov. Code §§11500, *et seq.*



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# Regulatory Basis: The Act

- §4601.1: “*In addition to any other penalty, any person who intentionally, knowingly, or negligently violates*” the Act or Rules subject to penalty up to \$10,000
- §4601.1(a) provides for civil cases brought by AG on behalf of Dept. in civil court
- §4601.1(b) provides for ACP
- §4601.1(c): person cannot be subject to ACP and civil penalty imposed by court





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# Regulatory Basis: The Act

- §4601.2(a): Director may issue Complaint and Proposed Order (CPO) setting out act or failure that constitutes violation and sets out *proposed* civil penalty
- §4601.2(b): Provides penalty factors  
Director must consider (more on this later)
- §4601.2(c): Respondent has ten days after service to file Notice of Defense (NOD); if NOD timely filed, hearing to be conducted



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# Regulatory Basis: The Act

- §4601.2(d): Proposed Order becomes final if hearing not timely requested
- §4601.2(c): Hearing must be conducted before Board, but Chairperson of the Board may delegate hearing to committee of the Board or Administrative Law Judge
- §4601.2(e): After hearing, Board (or ALJ, if Board requests Final Order) may adopt, with or without revision, the CPO



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# Regulatory Basis: The Rules

Art. 3.2 (1057-1058.5) fleshes out process:

- 1057.1: NOD must include written statements and documentation of defense
- 1057.2: Clarifies that if NOD not filed, Board shall adopt CPO
- 1057.3: If Board delegates hearing to ALJ, must tell OAH whether Board requests a proposed decision for consideration by Board or Final Decision



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# Regulatory Basis: The Rules

- 1057.3: If delegated to ALJ, proceedings must be in accordance with APA
- 1057.4: Defines contents of administrative record for consideration by Board
- 1058-1058.3: Procedures for hearing by Board itself, where not delegated to ALJ
- 1058.4 and -.5: Provides process for Board to review Proposed Decision by ALJ



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# ACP Process in Practice: Field

Process is initiated by field inspectors:

- Inspector learns of potential violation
- Inspector may be notified by neighbors, concerned professionals (RPFs, LTOs), other agencies (CDFW, Water Boards, County permitting personnel), or self-reported; may simply be observed by inspector in course of other duties
- Field inspection conducted



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# ACP Process in Practice: Field

- After inspection, if violations present, they are documented (Case Report, NOV)
- Inspector decides whether to issue NOV or to refer to DA for criminal charges
- If inspector wishes to pursue ACP or civil action through AG, the inspector will submit documentation of violation to Sacramento Forest Practice Enforcement staff



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# ACP Process in Practice: HQ

Once referred to Sacramento HQ by field, Forest Practice Enforcement staff take over:

- Enforcement staff review complaint to ensure that all elements of each violation are present as to each violator
- Ensure that we can prove each element of each violation at least by “the preponderance of the evidence,” which is standard for ACP and civil actions



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# Preponderance of the Evidence

- The Department has burden of proving each element by the preponderance of the evidence
- POE is lower than criminal standard of “beyond a reasonable doubt” or “clear and convincing evidence to a reasonable certainty” in professional licensing cases
- One body of evidence has more convincing proof than opposing evidence; or “more likely than not”





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# Elements of the Violation

- All violations have elements (necessary components/constituent parts) that must each be proven by the Department by the preponderance of the evidence
- “A constituent part of a claim that must be proved for the claim to succeed.” – Black’s Law Dictionary
- If Department fails to prove any element, Respondent entitled to judgment in favor

# Example: Elements of Timber Operations



## Statutory Definition (PRC 4527):

cutting or removal, or both, of timber or other solid wood forest products,... from timberlands for commercial purposes, together with all the incidental work... but excluding preparatory work such as treemarking, surveying, or roadflagging.

## Elements:

- Cutting or removal, together with all incidental work
- Of timber or other solid forest products
- From timberlands
- For commercial purposes



# Example: Elements of Timberlands

## **Statutory Definition (PRC 4526):**

land, other than land owned by the federal government and land designated by the board as experimental forest land, which is available for, and capable of, growing a crop of trees of a commercial species used to produce lumber and other forest products, including Christmas trees.

## **Elements:**

- Not Federal land
- Not designated as experimental forest land
- Available for growing a crop of commercial species
- Capable of growing a crop of commercial species



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# Example: Commercial Purposes

- Commercializing Timber (4527(a)(2)(A)): the cutting or removal of trees that are [intended to be] processed into logs, lumber, or other wood products and offered for sale, barter, exchange, or trade
- Converting Timberland (4527(a)(2)(B)): the cutting or removal of trees or other forest products during the conversion of timberlands to land uses other than the growing of timber



# Checklist: Elements of T.O.

- the cutting **OR** removal, or both, together with all incidental work
- of timber **OR** other solid wood forest products
- from timberlands: (check only if all boxes below checked)
  - Not owned by fed. gov. or designated exp. forest land **AND**
  - Available for growing crop of commercial species **AND**
  - Capable of growing crop of commercial species
- for commercial purposes, which include: (check if either box checked)
  - the cutting or removal of trees that are [to be or are intended to be] offered for sale, barter, exchange, or trade, **OR**
  - the cutting or removal of trees or other forest products during the conversion of timberlands to land uses other than the growing of timber



# *Mens Rea* as Element

- In addition to proving the elements of the physical act (*actus rea*) of the violation, Department must also prove the necessary *mens rea* (mental state) (i.e., the “unity of act and intent”)
- Civil & ACP: “any person who *intentionally, knowingly, or negligently* violates” the Act or Rules subject to civil penalties (PRC §§ 4601.1(b) & 4601.1(a)(1))



# *Mens Rea* as Element

- “The words ‘neglect,’ ‘negligence,’ ‘negligent,’ and ‘negligently’ import a want of such attention to the nature or probable consequences of the act or omission as a prudent man ordinarily bestows in acting in his own concerns.” (Penal Code § 7(2))
- “The word ‘knowingly’ imports only a knowledge that the facts exist which bring the act or omission within the provisions of the law.” (Penal Code § 7(5))



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# The Final Element: Who?

- Another element that must be proven is that the Respondent *is the person* who committed the physical act with the requisite mental state, but sometimes the law specifies the party who can violate law
- 4621(a): “A person who owns timberlands that are to be devoted to uses other than the growing of timber.”
- 4581: “No person shall conduct” ops
- 4571: “No person shall engage in” ops





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# Elements Scenario: Facts

Larry Landowner owns Whiteacre, a forty-acre parcel of timberland. Larry is approached by Gary Grower, who wishes to establish a cannabis cultivation operation on Whiteacre. Larry agrees to lease a two-acre portion to Gary, knowing of Gary's intentions and for an amount well exceeding market value. Gary contracts Carrie Contractor to clear the two acres of trees and terrace it for cultivation. Carrie is not an LTO. Carrie subcontracts the tree felling to Terry Timberoperator. Gary installs planter boxes.



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# Elements Scenario: Results

Larry Landowner has violated §4621(a)

- A person who owns timberlands
- That are to be devoted to uses other than growing timber
- Did not file an application for conversion



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# Elements Scenario: Results

Carrie Contractor has violated §§4571, 4581

- Person who conducted timber operations
  - Cut or removed timber (“removed” directly, contracted for “cutting”)
  - From timberlands
  - For commercial purpose (conversion)
- Did not have a THP (§4581)
- Did not have LTO license (§4571)



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# Elements Scenario: Results

Gary Grower has violated Rule 1103.1(a)

- Person who conducted “other conversion activities”
- On timberland proposed to be converted
- TCP not issued by Director

Usefulness of 1103.1(a) lies in ability to pursue someone who did not conduct operations and did not own the land, but was the motivating party for the conversion



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# Elements Scenario: Results

Terry Timberoperator has violated §4581

- Person who conducted timber operations
  - Cut timber
  - From timberlands
  - For commercial purpose (conversion)
- Did not have a THP
- But facts could show he was not negligent (e.g., misinformed about purpose)



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# ACP Process in Practice: HQ

Once HQ Forest Practice Enforcement determines it will move forward to ACP:

- Staff draft CPO for each violator, presenting the law and facts that constitute violation of law and establishing counts
- Staff drafting the CPO will go through penalty establishment exercise initially, subject to review and approval by the Enforcement Program Manager



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# Counts of the Violation

- Per 4601.1(b): “each specific act that results in a violation of [the Act or Rules], including an act that is repeated on separate days, shall be considered a separate violation”
- Rule of thumb taught to inspectors is that if the inspector would consider one act a violation in itself without knowing about any other act, then that act is its own violation, even if the same statute or Rule



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# Examples of Counts

- If 4 separate, distinct areas are converted, then 4 counts of any associated violations
- 4 days of operation without THP is 4 violations of 4581
- THP requires that all trees be felled away from arch site, 4 trees felled across site
- Missing fire tools at 2 inspections
- On 1104.1(a) exemption, RPF fails to flag boundary of 2 separate ELZs





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# Penalty Factors

4601.2(b): “shall consider *all relevant circumstances*, including, but not limited to”:

- Extent of harm caused by violation
- Nature, persistence, circumstances, extent and gravity
- Length of time over which violation occurred
- Whether any substantial damage caused by violation is susceptible to corrective action
- Whether willful or negligent



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# Penalty Factors

4601.2(b): “With respect to the violator”:

- Ability to pay penalty
- Effect on ability to remain in business
- Corrective action, if any, taken by violator
- Prior history of violations
- Degree of culpability
- Economic savings resulting from violation
- Such other matters as justice requires



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# Penalty Factors: Application

- The staff member drafting the complaint completes a worksheet by identifying facts relevant to each factor
- Enforcement Program Manager reviews worksheet and makes final determination
- Having the same person make final determination as to the penalty helps to ensure some consistency between cases, but case-specific factors mean that penalties for same violation may differ



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# ACP Process in Practice: HQ

- Once the CPO has been reviewed and approved by Enforcement Program Manager, it is reviewed by counsel, Staff Chief and Assistant Deputy Director, Forest Practice and Deputy Director, Resource Management
- Once approved by all reviewers, signed by Deputy Director, Resource Management, by delegation from Director
- Once signed, is served on Respondent



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# ACP Process: Post-Service

- Once served, Respondent has 10 days to file an NOD
- Once NOD filed, Department sends Respondent letter requesting available hearing dates and notifying Respondent of contacts for settlement or other purposes
- In practice, most Respondents wish to settle rather than going to hearing, and the Department is willing to settle with most Respondents



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# ACP Process: Settlement

- The Department favors settlement because it avoids costs associated with hearing, offers more flexibility, and can reach mutually agreeable outcome
- The Department can settle ACP case for terms that it could not achieve in hearing (e.g., corrective action, probation), since only monetary penalty may be imposed
- Settlement negotiations usually done in person, with or without attorneys present



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# ACP Process: Pre-Hearing

- If no settlement reached, or if Respondent does not seek one, Department prepares Request to Set Hearing
- Executive Officer of Board signs Request
- Request filed with OAH
- OAH schedules hearing date, notifies Department and Respondent
- Department must serve Respondent with additional Notice of Hearing



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# ACP Process: Hearing

- Hearing is conducted before ALJ with court reporter transcribing
- Hearing is conducted whether Respondent appears or not
- Commences with opening statements
- Department presents case in chief
- Respondent presents defense
- Parties and judge question witnesses
- Closing arguments made





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# ACP Process: Post-Decision

- ALJ has thirty days to render Proposed Decision
- Proposed Decision transmitted to Board, along with exhibits, etc.
- Transcript may or may not be ordered
- Board schedules hearing of matter for closed session in first meeting at which it may be heard (compliance with Bagley-Keene and Rule 1058.4's 10-day notice requirement may require delay)



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# ACP Process: Benefits

- Allows Department control and flexibility
- Is generally more cost-effective than other civil options (though not criminal) and Notice of Corrective Action
- No statute of limitation, only the equitable doctrine of laches to prevent injustice
- Settlement process allows Department chance to explain its enforcement goals and expectations, achieve greater compliance in future



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# ACP Process: Challenges

- Usually no notice of affirmative defenses, as required
- No-shows at hearings cost State heavily but are often rewarded by ALJ compared to a default
- While ALJs are very good at applying law and managing hearings, they tend to struggle with forestry principles

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# Questions?

